

NO. A08-1828

State of Minnesota
In Court of Appeals

In the Matter of a Request for Issuance of the
SDS General Permit MNG300000
for Ballast Water Discharges from Vessels
Transiting Minnesota State Waters of Lake Superior

**RELATOR MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY'S REPLY BRIEF
AND SUPPLEMENTAL APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF FACTS

The Minnesota Center for Environmental Advocacy (“MCEA”) strongly disagrees with the Minnesota Pollution Control Agency’s (“MPCA’s”) version of the facts, which includes many unsubstantiated assertions without citation — assertions that do not reflect the record and are irrelevant to the question this Court is asked to address.

MPCA claims to be “one of the plaintiffs that successfully sued the United States Environmental Protection Agency (“EPA”) to invalidate the federal regulation” exempting ballast water from the Clean Water Act, claiming responsibility for the landmark federal court ruling. (Resp. Br. p. 6). In point of fact, MPCA intervened after the environmental plaintiffs had already won: “the six states intervened as plaintiffs at the remedy stage ‘to protect their sovereign, proprietary, regulatory, and economic interest in the States’ waters.’” *Northwest Environmental Advocates v. United States Environmental Protection Agency*, 537 F.3d 1006, 1014 (9th Cir. 2008).

MPCA asserts it began work on a ballast water permit early in 2007, and omits that the federal court first ordered EPA to repeal its unlawful exemption in March 2005. *Id.* For decades, MPCA has had but failed to use its state permitting authority to protect Minnesota waters of Lake Superior from introductions of new invasive species. Last year, when the Ramsey County District Court examined MPCA’s record, it rebuked MPCA, saying, “[t]he Court does not believe that the

MPCA has handled the Minnesota ballast water issues with the urgency that VHS demands.” (Repl. Rel. App. 8).

Likewise, MPCA claims a 2007 California report refutes MCEA’s claim that technology will likely be available soon to treat ballast water to the far cleaner California standards. (Resp. Br. p. 12). MPCA quotes from the report’s synopsis of available technology in late 2007 (Rel. Supp. App. 189 [R. 1325]), but fails to direct the Court to the report’s statements on the following two pages, which vindicate MCEA’s position. (Rel. Supp. App. 190-191 [R. 1326-1327]). The report states that ballast water treatment systems, “will likely be at a level to meet California’s performance standards in the near future,” and its first recommendation to the California legislature – to require installation on new vessels beginning in 2010 – indicates that technology may be less than a year away. *Id.*

Finally, respondent appears not to grasp the fundamental difference between most traditional pollutants which generally dissipate from the water column over time, and living invasive pollutants, which can become established in the receiving water and then multiply over time. Traditional pollutants are often found suspended in the water column at natural or background concentrations, such that a discharge that is at or below the background concentration for that pollutant in that waterbody is held not to degrade its water quality. In contrast, new species invading a waterbody have no natural background concentration; every time they are discharged, water quality is degraded.

Unlike traditional pollutants, whose presence may attenuate over time, invasive species, once established, are essentially impossible to remove from a waterbody. (Repl. Rel. App. 6). While traditional pollutants may accumulate if higher concentrations are discharged,¹ they do not multiply on their own, as living invasive species do. Invasive viruses, bacteria, bivalves, and fish reproduce, and those with high rates of reproduction, like viruses and the zebra mussel, have the capacity to reproduce with shocking speed. Discharge of one round goby, infected with VHS, could contaminate the entirety of Lake Superior, and then Minnesota's inland lakes and waterways. (Repl. Rel. App. 2-3).

MPCA's Permit allows hundreds of millions of fish-sized organisms, tens of billions of smaller organisms, and an unlimited number of virus-sized organisms to be discharged, live, into Lake Superior each year. (Repl. Rel. App. 42). "Reducing" discharge rates to hundreds of millions and tens of billions of live organisms will not preserve Lake Superior's high water quality from degradation by invasive species. MPCA's glossing over the distinction between conventional pollutants and invasive species, and its failure to acknowledge the increased degradation that results from introduction of new invasive species, demonstrates the error in its analysis and deficiency of its permit.

¹ So-called "bio-accumulative" pollutants, like PCBs and mercury, are not at issue in this case and are not discussed.

ARGUMENT

I. THIS CASE INVOLVES QUESTIONS OF LAW AS TO WHETHER MPCA PROPERLY INTERPRETED AND APPLIED A RULE THAT IS CLEAR AND CAPABLE OF UNDERSTANDING.

A. MPCA's Interpretation Of The Rule Is Not Entitled To Deference.

MPCA wrongly argues that this Court must defer to MPCA's technical and factual expertise. MCEA's claim in this case is that MPCA erred as a matter of law because MPCA's interpretation of "expanded discharge" is inconsistent with the clear and understandable definition in applicable rule, Minn. R. 7050.0180. As the record is clear that the discharge contains new invasive species pollutants, this case raises legal questions involving a rule that is clear and capable of the Court's understanding.

In *In the Matter of the Cities of Annandale and Maple Lake*, the Minnesota Supreme Court plainly stated that the first question asked by a reviewing court is whether, "the meaning of the words in a regulation is clear and unambiguous," and if so, then the agency's interpretation is entitled to no deference; the court may substitute its own judgment for the agency's. *Annandale*, 731 N.W.2d 516. If instead the court determines that the regulation is unclear and ambiguous, then the court proceeds to determine whether the agency's interpretation of the regulation is reasonable, at which point the agency's expertise and special knowledge may be taken into account, "especially when the construction of the regulation's language is so technical in nature that the agency's field of technical training, education, and

experience is necessary to understand the regulation.” *Id.*; See also 731 N.W.2d at 524-525.

In short, because Minn. R. 7050.0180 is a rule whose language is clear and capable of understanding, because MCEA raises a legal challenge to MPCA’s interpretation of the rule, and because MPCA has failed to point to any terms in the rule that are ambiguous, no deference is owed the MPCA’s interpretation.

B. Respondent MPCA Misinterpreted And Did Not Properly Apply Minn. R. 7050.0180, Subp. 2(C), Defining “Expanded Discharge.”

MPCA erred in interpreting the definition of “expanded discharges” in Minn. R. 7050.0180, Subp. 2(C). The plain text of the Rule defines a discharge as “expanded” when the discharge changes “volume ... or in any other manner” after Outstanding Resource Value Water (“ORVW”) designation, “such that an increased loading of one or more pollutants results.” *Id.* MPCA found an expanded discharge occurs only with an increase in discharge volume. MPCA failed to find ballast water discharges covered by the Permit are expanded, despite undisputed evidence in the record that new pollutants – invasive species not present in the Great Lakes in 1984 – are present now and are being discharged with vessel ballast water. Respondent’s interpretation would read the words “one or more” out of the Rule.

1. The Permit allows for increases in pollutant loading.

To determine if an increased loading has occurred, the Rule requires comparing the loading of each pollutant in the discharge with the loading of each

pollutant on the day the waterbody was designated an ORVW. Because invasive species are pollutants, and new invasive species previously not present have entered the Great Lakes and ballast water since 1984, the loading of those new invasive species pollutants has increased from nil in 1984, to more than nil today. Under the terms of the Permit, hundreds of billions of living organisms, including invasive species not present in 1984, may be discharged each year. That is, the Permit allows increased pollutant loading² for new invasive species.

2. Individual invasive species are distinct and separate pollutants; their loads cannot be added and averaged to hide increases in individual pollutants.

The record shows that individual invasive species are different pollutants, in that they arrive severally, have distinct biologies, and cause distinctly different types and severities of damage when they invade. Zebra mussels and VHS are just

² Respondent inserts into its brief conclusions and language ascribed to the MPCA, but which never appear in the key MPCA documents. MPCA is said to have concluded that the “vast majority of ... discharges are neither new nor expanded because [they] did not come into existence **or expand allowable pollutant loading** after November 5, 1984...” (Resp. Br. p. 15; [Emphasis added].); and that “**increased pollutant loading** from ballast water discharges by ships that predate [1984] is unlikely to occur for two reasons.” (Resp. Br. p. 25; [Emphasis added].) Neither the Fact Sheet nor the Findings of Fact, Conclusions of Law, and Order contain any finding about increased pollutant loading. MPCA never made such a conclusion prior to issuing the Permit. Such statements would be impossible to substantiate, in light of undisputed record evidence that zebra mussels, VHS virus, and other new pollutants have entered the Great Lakes since 1984. (See, MCEA’s Opening Brief pp. 3-7).

Respondent slipped the underlined language into the Brief’s recitation of MPCA’s “conclusions.” In fact MPCA was required to make that finding, but failed to do so as and when required. The failure renders MPCA’s conclusion – that ballast water discharges are not expanded – without a legal prerequisite and thus affected by error of law.

two among the many post-1984 pollutants in Great Lakes ballast water. They are distinct species and each has caused distinctive and serious damage to the biological integrity and the industrial and recreational uses of the waters it infects. (See, MCEA's Opening Brief pp. 3-5, discussing zebra mussel invasion; and see Repl. Resp. App. 2, discussing VHS.) Zebra mussels and VHS are no more the same pollutant than are phosphorus and mercury. Lumping all invasive species together and treating them as one pollutant would be irrational, and no more permissible than lumping all heavy metals together. MPCA's argument, as quoted in the following section, is the equivalent of allowing an existing discharger that historically discharged copper and manganese to begin discharging arsenic, lead, cadmium, and mercury – without finding an increased loading for any of the new pollutant metals. It is an untenable reading of Minn. R. 7050.0180, Subp. 2(C).

3. Overall reduction in pollution does not insulate a discharge from non-degradation review; if any single pollutant's loading increases, there is an expanded discharge requiring non-degradation review.

MPCA's Brief implies that even though several new pollutants are present in ballast water today, nevertheless there is no expanded discharge and no need for non-degradation review so long as the Permit decreases the aggregate loading of all pollution in the discharge. See, Resp. Br. pp. 26-27 ("By imposing the most stringent technologically achievable treatment standards in its ... permit, MPCA has *decreased* the amount of allowable pollutant loading from ballast water discharges; not increased it.") (*Emphasis in original*); *Id.*, p. 15 ("Moreover, by

restricting for the first time the amount of pollution that vessels can discharge in their ballast water, MPCA's permit decreases rather than expands the allowable pollutant loading from ballast water discharges.") The text of Minn. R. 7050.0180 and established interpretation of 40 C.F.R. § 131.12 do not tolerate such a reading of the Rule.

The plain text of the Rule defines a discharge as "expanded" when the discharge changes in any way after the ORVW is designated, "such that an increased loading of one or more pollutants results." Minn. R. 7050.0180, Subp. 2(C). If a discharge introduces a new pollutant previously not discharged, that discharge has increased the loading of "one or more pollutants." No other reading of the regulatory language makes sense. Minn. Stat. § 645.08 (1) ("words and phrases are construed according to rules of grammar and according to their common and approved usage;...".)

Furthermore, the Rule cannot be interpreted as proposed by MPCA because such an interpretation would violate federal minimum requirements for state non-degradation rules established pursuant to 40 C.F.R. § 131.12. *Ohio Valley Env'tl Coalition v. Horinko*, 279 F.Supp.2d 732, 752-753 (S.D.W.V. 2003) (state procedures violated anti-degradation requirements in federal law because the state procedures allowed the approval of a discharge if the aggregated amount of all pollutants within the discharge decreased, even though increases could occur in individual pollutant loadings within the discharge).

II. MPCA CLAIMS THAT IT COMPLETED NON-DEGRADATION REVIEW, WHEN IT DID NOT.

MPCA has failed to point to any evidence in the record that it completed non-degradation review.

A. There Is No Evidence In The Record Of Analysis And Discussion, By MPCA, Of New Invasive Species' Effects On Water Quality.

Just as MPCA failed to recognize post-1984 aquatic invasive species as new pollutants triggering expanded discharge, MPCA also failed to analyze the effects that these new pollutants have had or will have on Lake Superior's existing high water quality. MPCA has failed to point to any such discussion, description, or analysis by MPCA in the record, as to the distinct and destructive effects on Lake Superior of each new invasive species that has arrived over the past 24 years, or of likely future arrivals. A search of the record for MPCA discussion, analysis, and conclusion about the significance of zebra mussels on Lake Superior's water quality produces none; it is as though the arrival of zebra mussels in Lake Superior in 1989 was a non-event. The same is true for VHS, bloody-red shrimp, and all the other new and impending arrivals: non-recognition and non-treatment by MPCA in the record. MPCA's Fact Sheet, its Findings of Fact, Conclusions of Law, and Order, and its Brief do not so much as even name these new species, much less discuss them and analyze their observed or expected effects on Lake Superior.

The “review” portion of non-degradation review does not exist in the record, because none was done.

B. MPCA Failed To Prepare Or Put Into The Record Any Assessment And Appropriate Characterization Of Lake Superior’s “Existing High Quality.”

MPCA was required to do an assessment and characterization of Lake Superior’s “existing high quality.” That assessment and appropriate characterization is indispensable as a point of reference for developing a permit required to preserve that existing water quality. Again, however, the MPCA’s Brief has failed to point to any evidence in the record of an assessment and characterization of Lake Superior’s water quality.³

MPCA invokes judicial deference as to the sufficiency of its Permit, but deference is barred. The water quality assessment and characterization, and an

³ Respondent denies, in its Brief, the need for any assessment and characterization of Lake Superior’s existing high water quality in this case. Without any citation to the record, Respondent asserts in its Brief a new theory that is absent from the record: “[i]n this case, the existing high quality of Lake Superior is the quality of the water with decades of literally unlimited amounts of pollution from ballast water discharges.” (Resp. Br. p. 31). This statement is without discernable meaning. It suggests no reference date and offers no real information about Lake Superior. To the extent that it describes water quality of Lake Superior, it does so for any waterbody anywhere in the world that has been subject to decades of invasive species-laden ballast water discharges. To the extent it describes a waterbody’s water quality “now,” it also does so at times in the past and times in the future. It is, at minimum, unhelpful to MPCA in showing what it must show, which is that the agency produced an assessment and appropriate characterization of the water quality in Lake Superior that must be preserved.

This one-sentence “characterization” of water quality is not sufficient to take the place of a proper characterization of existing high water quality. Respondent’s statement is intended to dismiss, rather than to answer, the question as to Lake Superior’s water quality.

examination and description of the threat posed by invasive species, are absent from the record, and without them there is nothing to which the Court can defer. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 696 N.W.2d 95, 108 (Minn. Ct. App. 2005) (hereinafter, "*Princeton*").

C. MPCA's Attempts To Distinguish *Princeton* Fail.

First, MCEA relies on *Princeton* for the proposition that defining and explaining the "existing high quality" of a waterbody is an essential element of non-degradation review, an element that is missing from MPCA's permitting decision here. As this Court said in rejecting MPCA's *Princeton* permit, "there is no evidence in the record defining or describing the quality of the water that is to be protected. Without defining what the existing quality of the water is, it is not possible to evaluate whether [the discharge] has been restricted to the extent necessary to preserve that quality." *Id.*, p. 108. The same is true of MPCA's ballast discharge Permit allowing discharges to Lake Superior.

Second, the fact that the *Princeton* Court noted that the proposed discharge in that case was the first such permitted discharge is irrelevant to the need for characterizing the receiving water's high water quality. The *Princeton* Court, after determining that MPCA was entitled to no deference in its interpretation of the clear terms "existing high water quality," instructed the MPCA to use its expertise to develop a baseline of the water quality in the Rum River, the ORVW in that case. *Id.*, p. 108. The Court noted that once the baseline is established "permitted discharges need to be restricted to the extent necessary to preserve that quality."

Id. Here, MPCA has failed to provide a baseline water quality assessment for Lake Superior that it can use (and that others, including the Court, could review) to determine what level of restriction is necessary in the ballast water Permit. MPCA has not described what it is the Permit needs to preserve.

Third, *Princeton's* requirement for baseline water quality assessment does not only apply where alternative technologies or available treatments have been proffered by commenting parties. It is MPCA's burden to conduct the non-degradation review and impose restrictions that will preserve water quality. *Princeton's* discussion of what is required to define the water quality that must be preserved is not dependant on another party's showing of alternative treatments. Moreover, in the case at hand, there *were* alternatives offered, including stricter performance standards adopted elsewhere and a shorter compliance timeline, but MPCA, without any justification related to the preservation of existing water quality, rejected those alternatives.

This Court, in *Princeton*, gave direction to MPCA which the agency ignored in the instant case. What the Court said then, still applies: "Absent a baseline, merely setting limits that achieve a quality at or slightly above the minimum required for all waters, as MPCA has done in this case, is an arbitrary and capricious method of determining what limits are necessary to protect existing water quality of this valuable water resource." *Id.* MPCA cannot even ensure that the limits and timeline it chose for the general ballast water Permit would be sufficient to satisfy the minimum required for all waters, let alone that they

“restrict the discharge to the extent necessary to preserve the existing high quality” of Lake Superior. Minn. R. 7050.0180, subp. 6. The Court should remand the permit here for the same reasons it rejected MPCA’s permit in *Princeton*.

III. MPCA HAS FAILED TO SHOW THAT IT SELECTED PERMIT TERMS THAT WILL PRESERVE LAKE SUPERIOR’S HIGH WATER QUALITY.

In arguing that the Permit’s performance standards and timeline are reasonable (Resp. Br. pp. 27-38.), MPCA misses the point of MCEA’s legal challenge. MCEA’s challenge is that the MPCA failed to go through the prescribed process for determining how stringent the Permit’s terms must be in order to preserve the existing high quality of Lake Superior. Minn. R. 7050.0180, Subp. 6 (“If a new or expanded discharge to these waters is permitted, the agency shall restrict the discharge to the extent necessary to preserve the existing high quality ... that make the water an outstanding resource value water.”) That failure led the MPCA to the wrong Permit terms, principally the selection of International Maritime Organization (“IMO”) performance standards and an extended seven-year implementation timeline. MPCA’s Brief fails to offer any evidence in the record that the agency was seeking to preserve high water quality when it rejected more stringent performance standards and a shorter implementation timeline.

A. Respondent’s Brief Identifies No Additional Evidence Of A Water Quality-Based Rationale For Rejecting More Stringent Performance Standards Than The IMO Standards.

Respondent offers no water quality-based rationale in the record for rejecting more restrictive standards than the IMO standards. Respondent’s sole

additional rationale is that MPCA decided that, “including more stringent standards [...] when there is no technology to meet those standards would be a paper exercise with no environmental benefit.” (Resp. Br. p. 31). MPCA’s conclusion is unsupportable and in conflict with a primary objective of the federal Clean Water Act, which is to encourage technological innovation by setting requirements based on water quality. Respondent’s position is that it can replace the required water quality-based standard with a technology-based standard, but Congress determined otherwise:

Congress did not intend to tie compliance with water quality-based limitations to the capabilities of any given level of technology. A technology-based standard discards its fundamental premise when it ignores the limits inherent in the technology. By contrast, a water quality-based permit limit begins with the premise that a certain level of water quality will be maintained, come what may, and places upon the permittee the responsibility for realizing that goal.

...

While at first blush it seems odd to expect dischargers to go beyond the limits of extant technology, it becomes apparent that Congress had a deep respect for the sanctity of water quality standards and a firm conviction of need for technology-forcing measures.

Natural Resources Defense Counsel v. EPA, 859 F.2d 156, 209 (C.A.D.C., 1988).

Accordingly, Respondent has failed to point to evidence in the record that it had a valid water quality-based rationale for failing to choose more stringent standards.

Likewise, MPCA has failed to point to any evidence in the record that it concluded the Permit will preserve the existing high water quality in Lake Superior. Respondent’s Brief asserts that MPCA did so conclude, but the

assertions in the Brief are either unsupported by citations to the record, or do not accurately reflect language in the cited documents.⁴

B. Respondent's Brief Identifies No Record Evidence Of A Water Quality-Based Rationale For Rejecting A Faster Implementation Timeline.

Respondent's Brief points to no evidence in the record suggesting that MPCA had a water quality-based rationale for selecting the timeline it did, and for rejecting a faster one. Respondent asserts that, "vessels will actually be installing [treatment] technology as they go into drydock over the next few years; not waiting until 2016." (Resp. Br. p. 36). This statement is offered without citation to the record, but if true as MPCA suggests, then it is apparent that a faster implementation timeline is readily available if only the MPCA were willing to require it. (Repl. Rel. App. 31).

MPCA has failed to point to any evidence in the record that MPCA selected the timeline it did on the basis required to meet the appropriate non-degradation standard, i.e., that the timeline selected for implementing the Permit's performance

⁴ See, Resp. Br. p. 31, first paragraph: "MPCA Staff also reasonably concluded ... this permit will maintain and improve the quality of Lake Superior."; and compare: "The permit ... is much more protective than the former practice of allowing untreated ballast water discharges to Lake Superior" (Repl. Rel. App. 33); "The permit will result in a decrease in the potential for the discharge of aquatic invasive species in ballast water..." (Rel. Supp. App. 200 [R. 656]); "The permit is intended to take a first step towards protecting Minnesota waters of Lake Superior." (Rel. Supp. App. 203 [R. 576]); "The MPCA is hopeful that this permit will effectively control this source of aquatic invasive species. The development of the proposed permit limits and conditions was done with the intent of maintaining the designated uses of the Minnesota Waters of Lake Superior and protecting water quality." (Rel. Supp. App. 204 [R. 577]).

standards “restrict[s] the discharge to the extent necessary to preserve the existing high quality ... that make[s] [Lake Superior] an outstanding resource value water.”

CONCLUSION

Because an invasive species is a pollutant and the Great Lakes, including Lake Superior, contain new invasive species not present when the lake was designated an outstanding resource value water, the Permit in this case covers expanded discharges under the terms of Minn. R. 7050.0180, subp. 2(C), and thus is subject to non-degradation review. Because the MPCA erroneously concluded it was not required to conduct non-degradation review, and in any case failed to conduct adequate non-degradation review, the agency issuance of the Permit is a decision affected by error of law and MCEA asks that it be remanded to the MPCA to perform a thorough non-degradation review resulting in strict permit controls necessary to preserve Lake Superior’s high water quality.

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 4,241 words and complies with the type/volume of the Minnesota Rules of appellate Procedure 132. This Brief was prepared using a font size of 13 point. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.


Matthew Norton